DRN-4045901

The complaint

Ms S has complained about the way Creation Consumer Finance Limited ("Creation") responded to a claim she'd made under section 75 (s75) of the Consumer Credit Act 1974 (the "CCA").

Ms S has been represented in bringing her complaint but, to keep things simple, I'll refer to Ms S throughout.

What happened

In December 2013, Ms S entered into a fixed sum loan agreement with Creation to pay for a £9,500 solar panel system from a supplier I'll call "P". The loan amount was for £9,500 and the total amount payable under the agreement was £14,946 and it was due to be paid back with 120 monthly repayments of £124.55.

Creation told us that they received Ms S's letter of complaint on 15 July 2020. In the complaint Ms S explained that she considered she had a valid claim against it under s75 due to misrepresentation and breach of contract by P. Ms S said she'd been told she could be entitled to a solar panel system at no cost to her. She says she was told the system would be fully self-funding.

In summary, Ms S says:

- P's representative misled her that the system would pay for itself within 8 years and then she would have many years of reduced electricity bills which would be profit.
- P told her the FIT payments and savings she would make would cover the cost of the loan repayments.
- P told Ms S she would save in excess of £10,000 due to the supply of LED light bulbs.
- P told Ms S that installing solar panels would reduce the council tax bill by 50%.
- She was induced into the agreement by false statements from P. She wouldn't have entered into the agreement had it not been for those statements.

On the basis of the above Ms S said she had a like claim against Creation for breach of contract and misrepresentation under s75.

To resolve the claim and complaint, Ms S requested that Creation should make a payment to settle the matter.

Creation told us that they received Ms S's letter of complaint on 15 July 2020. Creation did not provide a final response letter to the complaint initially and so the complaint was referred to this service on 14 October 2020. Creation issued a final response letter on 6 November 2020. Creation rejected Ms S's complaint on the basis it was made out of time based on their understanding of the FCA's DISP rules. Creation did not comment on the s75 claim so far as it concerned a breach of contract. Whilst the complaint to Creation did not mention Section 140A (s140A) of the CCA, in bringing the complaint to this service,

Ms S raised an alleged failure under that part of the Act. Creation has not responded to the s140A aspect of the complaint in its final response.

Ms S wasn't happy with the response to the complaint so asked us to review the complaint.

Creation explained that it considered the s75 claim to be time-barred. Consequently, Creation believe that it has no liability to Ms S under said Act and so they have no liability under s75 of the CCA.

I have taken this to mean that Creation have rejected Ms S's s75 claim for misrepresentation on the basis it was 'time-barred' taking into account the Limitation Act 1980 (the 'LA').

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Our approach to jurisdiction to consider the complaint

Our powers to consider complaints are set out in the Financial Services and Markets Act 2000 ("FSMA") and in rules and guidance contained in the FCA's Handbook known as DISP.

The rules surrounding time limits within which to refer complaints are set out in DISP 2.8.2R which include that:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) more than six months after the date on which the respondent the complainant its final response, redress determination or summary resolution communication; or

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received"

Further, DISP 2.3.1R sets out the activities which I can consider under our compulsory jurisdiction, and within scope are complaints which relate to acts or omissions by firms in carrying on one or more regulated activities (see DISP 2.3.1R(1)). The regulated activities are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO").

There are several other rules and guidance provisions relevant to our jurisdiction, and for the avoidance of doubt, I have only set out relevant DISP rules and guidance

so far as is necessary for the purposes of addressing this complaint.

I consider the complaint to have been referred to the ombudsman service on 14 October 2020, which is the date when Ms S's representative sent details of her complaint to our service.

I'll first consider our service's jurisdiction to consider Ms S's s75 complaint. I will then consider our service's jurisdiction to consider Ms S's complaint in relation to an alleged unfair relationship taking into account section 140A (s140A) of the CCA, before turning to the merits of the complaint.

My findings on jurisdiction

(1) Jurisdiction to look at the s75 complaint

Where Creation exercises its right and duties as a creditor under a credit agreement it is carrying out a regulated activity within the scope of our compulsory jurisdiction under Article 60B(2) of the RAO. In undertaking that activity, the creditor must honour liabilities to the debtor. So, if a debtor advances a valid s75 claim in respect of the credit agreement, the creditor has to honour that liability and failing or refusing to do so comes under our compulsory jurisdiction.

Ms S brought her complaint about this to the ombudsman service on 14 October 2020 before the final response letter had been issued but three months after raising the complaint with Creation. The event complained of here is Creation's allegedly wrongful rejection of Ms S's s75 claim on 6 November 2020. So, her complaint in relation to the s75 claim was brought in time for the purposes of our service's jurisdiction because Ms S was not happy with the answer in the final response letter.

Creation argued the complaint was out of our jurisdiction taking into account the LA, but our service has its own rules under DISP 2.8.2R saying when a complaint is brought too late. The LA does not limit our jurisdiction. However, I do consider that the LA is relevant law for the purposes of the merits of Ms S's complaint about its rejection of the s75 claim, and I have set out why that is the case later in this decision.

(2) Jurisdiction to look at the complaint about an unfair relationship under s140A

Creation has referred us to its final response letter and explained subsequently that the s75 claim was time-barred under the LA but has not explicitly raised any objections to our jurisdiction to consider the s140A complaint. However, to the extent it may be implied that Creation also disputes our jurisdiction to consider the s140A aspect of the complaint, I shall address this.

Ms S is able to make a complaint about an unfair relationship between herself and Creation per s140A. The event complained of for the purposes of DISP 2.8.2R(2)(a) is Creation's participation, for so long as the credit relationship continued, in an allegedly unfair relationship with her. This accords with the court's approach to assessing unfair relationships – the assessment is performed as at the date when the credit relationship ended: *Smith v Royal Bank of Scotland plc* [2023] UKSC 34.

In this case the credit relationship was still running when the complaint was brought to this service. The complaint in relation to s140A was referred to the ombudsman service on 14 October 2020. So, the s140A complaint was brought less than six years after the event complained of and has been brought in time.

I am satisfied I have jurisdiction to consider the complaint about an alleged unfair relationship per s140A in the circumstances.

Merits

(1) My findings on the merits of the s75 complaint

Creditors have no means of knowing what s75 liabilities they may have, nor of investigating such liabilities nor of recovering them from suppliers, unless or until debtors raise s75 claims against them; and (as I have explained above) raising the claim, if it's a valid one, brings the creditor under a duty then to honour its liability.

But it would not be fair or reasonable to require a creditor to respond to s75 claims however long in the past they arose. And our service must decide complaints on the basis of what is fair and reasonable in all the circumstances of a case.

The law imposes a six-year limitation period on the relevant claims, after which they become time barred. Taking into account this time period, the particular nature of liability under s75, and the need for the debtor to raise a s75 claim against their creditor before a cause for complaint to our service can arise, I consider it is fair and reasonable for a creditor not to have to look into or honour a s75 claim that was first raised with it by the debtor after the claim had become time barred under LA. This is in line with our service's long-standing approach to complaints under s75.

Creation has said the s75 claim was brought outside of the relevant six-year limitation period under the LA for misrepresentation claims though it does not address the allegations of the s75 claim arising from a breach of contract. The alleged misrepresentation cause of action arose when an agreement was entered into during December 2013 based on the alleged misrepresentations. The alleged breach of contract isn't defined but I take it to be that P (acting on behalf of Creation) warranted that the solar panel system it agreed to provide had the capacity to finance the loan repayments, when that was incorrect. As such, the alleged breach of contract also occurred as soon as the agreement was entered into.

The s75 claim wasn't raised with Creation until 15 July 2020, that is more than six years after the causes of action against P for misrepresentation and breach of contract would have accrued for the purposes of the LA around December 2013.

Where it is unlikely a claim against the supplier could succeed due to the expiry of the likely relevant limitation periods of six years, I am persuaded that it was fair and reasonable for Creation to decline the s75 claim. So, I do not uphold this aspect of the complaint.

(2) My findings on the merits of the complaint about an unfair relationship under s140A

I've considered whether representations and contractual promises by P can be considered under s140A.

Therefore, I've considered the court's approach so far as it is relevant to the merits of the s140A complaint I am considering. I have taken into account the Court of Appeal's judgment in *Scotland & Reast v British Credit Trust* [2014] EWCA Civ 790 ("*Scotland*") which said the following when considering what could be relevant to an unfair relationship claim under s140A:

> *"In this regard it is important to have in mind that the court must consider the whole relationship between the creditor and the debtor arising out of the credit agreement and whether it is unfair having regard to one or more of the three matters set out ins.140A(1), which include anything done (or not done) by or on behalf of the creditor before the making of the agreement. A misrepresentation by the creditor or a false or misleading presentation of relevant and important aspects of the transaction seem to me to fall squarely within the scope of this provision."*

Scotland makes it clear that relevant matters would include misrepresentations and other false or misleading statements as to relevant and important aspects of a transaction. As I've already set out, s56 has the effect of deeming P to be the agent of Creation in any antecedent negotiations. Creation is responsible for the antecedent negotiations P carried out direct with Ms S.

I think the negotiations were antecedent because they preceded the relevant conclusion of the agreement. The scope of 'negotiations' and 'dealings' is wide. And 'representations' covers statements of fact, contractual statements and other undertakings. Taking this into account, I find it would be fair and reasonable in all the circumstances for me to consider P's negotiations and arrangements for which Creation was responsible under s56 of the CCA when deciding whether it's likely Creation had acted fairly and reasonably toward Ms S.

But in doing so, I should take into account all the circumstances and consider whether a Court would find the relationship with Creation was unfair under s140A.

The negotiations

Creation hasn't supplied any evidence on what was (or wasn't) discussed or negotiated between Ms S and P.

Ms S told us she was informed she could be entitled to have a Solar System at absolutely no cost to her.

I've also looked at the paperwork that has been supplied to see if there was any evidence to support Ms S's allegation she was told it would be self-funding. Apart from the loan agreement I have seen little from the time of the sale that speaks to the complaint points.

The loan agreement sets out Ms S's responsibilities for repaying the loan amount and the monthly cost of that. And the Solar Assessment Order Form contains a section that describes the 'Potential Income – Savings' which does not provide a clear picture of the likely financial benefits from the system. I say that because the amount for income from Feed In Tariff payments in year one is said to be over £25,000. But the Total potential income in year one is said to be around £400. In the absence of clarity in the documentation that was received by Ms S at the time I think that Ms S would placed weight on what she was told by P at that time.

I must consider all the submissions made to me in a complaint. But I am also able to consider other relevant information. In this case I have considered that in 2014 P were found to be in breach of the Renewable Energy Consumer Code in September 2014. And one of the breaches was found to be that consumers may have been misled about the costs of the loan being met fully by income generated from the solar panels. So, this seems to support what Ms S told us; that the solar panels cost would be fully met from the

income and savings they could generate. So, on balance it seems more likely than not that P did tell Ms S the scheme would be self-funding.

I've not seen anything to indicate Ms S had an interest in purchasing a solar panel system before P contacted her. Ms S has said she only agreed to the purchase because the system would be self-funding. I'm mindful that it would be difficult to understand why, in this particular case, Ms S would have agreed to install a solar panel system if her monthly outgoings would increase.

Ms S told us that P told her the income from the solar panel system would pay off the agreement. I have noted that our investigator thought that Ms S's testimony seemed persuasive and explained why they thought that in their assessment. I have noted that Creation has not responded to that assessment.

So, having considered all the submissions made in this complaint, and in the absence of any other evidence from Creation to the contrary, on balance it seems more likely than not that P did tell Ms S the scheme would be self-funding. On balance, I find Ms S's account to be plausible and convincing.

For the solar panels to be self-funding, they'd need to produce a combined savings and FIT income of around £1,494.60 per year. I've not seen anything to indicate there's a problem with Ms S's solar panel system. But I've also not seen enough to suggest she's achieved this benefit. The FIT statements I've seen do not seem to be complete but they don't seems to suggest that Ms S was achieving the kind of benefits that would have made the loan self-funding. I've not been supplied a full set of copies of Ms S's electricity bills, so I don't know what savings she made. But based on what I have seen, I think it's more likely than not the system wasn't self-funding.

I therefore find the statements made as to the self-funding nature of the system weren't true. I think the salesperson ought to have known this and made it clear that the solar panel system wouldn't have produced enough benefits to cover the overall cost of the fixed sum loan agreement. However, I think it's important to take into account any savings Ms S made, so I will come back to this later on in this decision.

Taking into account what I've said above, I think it likely P gave Ms S a false and misleading impression of the self-funding nature of the solar panel system. I consider P's misleading presentation went to an important aspect of the transaction for the system, namely the benefits which Ms S was expected to receive by agreeing to installation of the system. I consider that P's assurances in this regard likely amounted to a contractual promise that the solar panel system would have the capacity to fund the loan repayments. But even if they did not have that effect, they nonetheless represented the basis upon which Ms S went into the transaction. Either way, P's assurances were seriously misleading and false, undermining the purpose of the transaction from Ms S's point of view.

Would a court likely make a finding of unfairness under s140A?

Where Creation is to be treated as responsible for P's negotiations with Ms S in respect of its misleading and false assurances as to the self-funding nature of the solar panel system, I am satisfied that a court would likely find the relationship between Ms S and Creation to have been unfair.

Ms S has had to pay more than she expected to cover the shortfall towards the repayments. Creation has benefited from the interest paid on a loan Ms S otherwise wouldn't have taken out. Therefore, I am also satisfied that Creation has not treated

Ms S fairly or reasonably in all the circumstances of the complaint. I consider the fairest way to address this is to resolve the matter as I set out below.

Putting things right

Fair compensation

In all the circumstances I consider that the fair compensation should aim to remedy the unfairness of Ms S and Creation's relationship arising out of P's misleading and false assurances as to the self-funding nature of the solar panel system. I require Creation to repay Ms S a sum that corresponds to the outcome she could reasonably have expected as a result of P's assurances. That is, that Ms S's loan repayments should amount to no more than the financial benefits she receives for the duration of the loan agreement.

Therefore, to resolve the complaint, Creation should recalculate the agreement based on the known and assumed savings and income Ms S received from the solar panel system over the 10-year term of the loan, so she pays no more than that. To do that, I think it's important to consider the benefit Ms S received by way of FIT payments as well as through energy savings. Ms S will need to supply up to date details of all FIT benefits received, electricity bills and current meter readings to Creation. Creation can use assumptions when information is not available – if, for example, the electricity company has gone out of business. Ms S should let us know in response to this decision if she's unable to supply any of the relevant FIT benefits, electricity bills and meter reading, and the reasons why.

Creation should:

- Calculate the total repayments Ms S made towards the loan up until she repaid it – A
- Use Ms S's electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received up until she repaid the loan – B
- Use B to recalculate what Ms S should have repaid each month towards the loan over that period and reimburse her the difference between what she actually repaid (A) and what she should have repaid, adding 8% simple annual interest* to any overpayment, from the date of repayment until the date of settlement – C
- Use her electricity bills, FIT statements and meter readings to work out the known and assumed benefits she received between the loan being paid off and the end of the original loan term – D
- Deduct D from the amount Ms S paid off the loan – E
- Add 8% simple annual interest* to E from the date Ms S paid off the loan until the date of settlement – F
- Subject to receiving the available up to date FIT benefits, electricity bills, and meter readings Creation should pay Ms S C + F

I agree Creation's failure to consider the claim under s140A has also caused Ms S some further inconvenience. And I think the £200 compensation recommended by our investigator is broadly a fair way to recognise that.

* If Creation considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Ms S how much tax it's taken off. It should also give Ms S a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For the reasons given above, I uphold Ms S's complaint about Creation Consumer Finance Limited and require them to calculate and pay the redress detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 27 May 2024.

Douglas Sayers
Ombudsman